

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 KA 0741

STATE OF LOUISIANA

VERSUS

DAVID LEE KILLEN

Judgment Rendered: November 7, 2014

**Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 519064, District B**

The Honorable August J. Hand, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

THERIOT, J.

Defendant, David Lee Killen, was charged by bill of information with domestic abuse battery by strangulation, a violation of La. R.S. 14:35.3(L). He pled not guilty and waived his right to a jury trial. Following a bench trial, defendant was found guilty as charged. The trial court sentenced defendant to three years at hard labor. Subsequently, the state filed a habitual offender bill of information, alleging defendant to be a second-felony habitual offender.¹ Defendant admitted to the contents of the habitual offender bill of information. The trial court adjudicated defendant a second-felony habitual offender, vacated his underlying sentence, and sentenced him to five years at hard labor, without benefit of probation or suspension of sentence. Defendant now appeals, alleging two assignments of error. For the following reasons, we affirm defendant's conviction, habitual offender adjudication, and sentence.

FACTS

Early in the morning hours of March 4, 2012, defendant and his live-in girlfriend, Kimberly Bell, returned home after an evening of visiting various bars in the Covington area. Also accompanying the couple was Stephen Falls, a friend of defendant. Shortly after arriving home, defendant went to the master bedroom alone, locking the door behind him. Believing defendant to be angry, Bell walked over to a bedroom where Falls was located, and she began to talk to him. In the course of speaking with Falls, Bell showed him photographs of alleged previous instances of physical abuse that defendant had inflicted upon her.

¹ The habitual offender bill of information listed defendant's alleged predicate offense as a July 30, 2007 conviction for unauthorized entry into an inhabited dwelling under St. Tammany Parish docket number 424745.

After approximately forty-five minutes of waiting, Bell decided to go knock on the door of the master bedroom. Having been woken up, defendant answered the door. Shortly thereafter, a scuffle ensued between defendant and Bell. During the altercation, defendant's hands became wrapped around Bell's neck, and she began to feel as though she was losing consciousness. Bell was eventually thrown against one of the bedroom walls, hitting her head with enough force to crack the drywall. Apparently at some point during the altercation, Bell scratched defendant's chest and back with her fingernails.

When the altercation subsided, Bell ran back to the master bedroom and locked herself inside it. Defendant retrieved Falls from the guest bedroom and relocated to another spare bedroom in the upstairs area of the home. Bell briefly exited the master bedroom to enter the bedroom where defendant and Falls were located in order to retrieve her cell phone. After doing so, she returned to the master bedroom and began to post on Facebook the same pictures of alleged previous abuse that she had shown to Falls. Falls, having seen that Bell was posting these pictures, advised defendant to call 911. Defendant did so and was subsequently arrested after officers responded and took statements from defendant, Bell, and Falls.

ASSIGNMENTS OF ERROR

Defendant raises two assignments of error:

1. Whether the guilty verdict of domestic abuse battery by strangulation is supported by sufficient evidence.
2. Whether the trial court erred in allowing La. Code Evid. art 404(b) evidence.

SUFFICIENCY OF THE EVIDENCE

Defendant argues that the trial court erred in finding that the state proved his guilt beyond a reasonable doubt. Specifically, he avers that the

trial court erred in accepting Bell's version of the incident because her testimony was not credible.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); *State v. Ordodi*, 2006–0207 (La. 11/29/06), 946 So.2d 654, 660; *State v. Mussall*, 523 So.2d 1305, 1308–09 (La. 1988). The *Jackson* standard of review, incorporated in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See *State v. Patorno*, 2001–2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Domestic abuse battery by strangulation is the intentional use of force or violence by a household member upon the person of another household member, without consent of the victim, by the act of intentionally impeding the normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of the victim. See La. R.S. 14:35.3(A) & (B)(3). In the instant case, there is no question whether defendant and Bell qualify as “household members” under the statute; they both were living in the same residence when the domestic abuse battery occurred. The only issue is whether the evidence presented at trial was sufficient to prove that defendant strangled Bell.

At trial, the victim testified that when she knocked on the master bedroom door, defendant opened it and pulled her inside the room. She stated that as the defendant yelled at her for waking him up, he got on top of her and began to strangle her by placing his hands around her neck. Bell testified that she struggled to breathe and that she began to feel as though she were losing consciousness. Bell was unsure why defendant ceased strangling her, but she realized he had when he threw her against the bedroom wall. Bell stated that after she was thrown into the wall, defendant dragged her to the living room, where he repeatedly shoved her onto the couch while threatening to kill her. Once defendant stopped shoving her, Bell ran to the master bedroom.

Defendant testified at trial on his own behalf. In contrast to Bell's version of events, defendant stated that as he opened the bedroom door for the victim, she entered the room and began to scratch and grab at him. Defendant admitted to pushing the victim away from him in an attempt to get her off of him, and he stated that he did indeed push her into the bedroom wall. However, he denied ever putting his hands around the victim's neck or attempting to strangle her. Defendant characterized the victim as the aggressor.

Both the state and the defense presented a copious amount of other evidence that was calculated to diminish the credibility of defendant and Bell, respectively. This evidence typically involved descriptions of earlier alleged altercations between defendant and the victim, and it also tangentially related to allegations of fraud within defendant's chiropractic practice. None of that evidence was directly relevant to the offense for which defendant was convicted. However, the trial court was presented with all of this evidence prior to returning a conviction in the case.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. *State v. Taylor*, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. *State v. Quinn*, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

After a thorough review of the record, we are convinced that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the state, could find the evidence proved beyond a reasonable doubt, and to the exclusion of the hypothesis of innocence raised by defendant, all of the elements of domestic abuse battery by strangulation. When a case involves circumstantial evidence and the fact finder reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. *State v. Captville*, 448 So.2d 676, 680 (La. 1984). No such hypothesis exists in the instant case.

Based upon the conviction, the trial court obviously believed Bell's testimony to be more credible than defendant's own testimony. The testimony of the victim alone is sufficient to prove the elements of the offense. *State v. Johnson*, 529 So.2d 466, 472 (La. App. 1st Cir. 1988), writ denied, 536 So.2d 1233 (La. 1989). This court will not assess the credibility

of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. *State v. Lofton*, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Additionally, in reviewing the evidence, we cannot say that the fact finder's determination was irrational under the facts and circumstances presented. See *Ordodi*, 946 So.2d at 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a conviction on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the fact finder. See *State v. Calloway*, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

OTHER CRIMES EVIDENCE

Defendant also argues that the trial court erred in admitting evidence that the state sought to introduce under La. Code Evid. art. 404(B). Specifically, he contends that the trial court allowed the state to introduce evidence that was calculated to portray defendant as a "bad person," rather than as proof of one of the other allowable grounds for other crimes evidence under article 404(B).

Prior to trial, the state filed a notice of intent to use other crimes evidence under La. Code Evid. art. 404(B). In the notice, the state argued that defendant had previous domestic violence incidents which displayed "a distinct pattern of violence to females who displease him and/or fail to

comply with his wishes.” Defendant filed a motion to exclude this proposed other crimes evidence, denying that most of the alleged prior acts had ever occurred. Following a hearing, the trial court issued a written order with accompanying reasons, denying defendant’s motion to exclude evidence of other crimes and allowing the state to introduce the other crimes evidence at trial.

At a subsequent pretrial hearing, defendant waived his right to a jury trial. At this same hearing, the state and defendant entered into the following stipulation:

The stipulation is the Court may consider and use all testimony that it heard at the 404(B) hearing, in particular, but not limited to the testimony of Mary Ann Smith, Jodi Morris, Jennifer Zimmerle and Samantha Goodwin, who were all the subject of cross-examination.

And his determination of the guilt or innocence of the defendant, David Killen. And the defendant does hereby, with his counsel present, waive any and all objections to be used as testimony by the Court at the trial of this matter. The stipulation by the defendant does not in any manner limit the right of the State to call any witness either on direct or [sic] testimony and rebuttal.

After further discussions with the trial court, the state and defense clarified that the court could consider and use the testimony from the article 404(B) hearing, but that defense counsel could make any arguments he wished regarding the weight of that testimony. However, defense counsel agreed that he gave up any right to make any objections with respect to the relevance of that testimony. At trial, the state did not call any witnesses from the article 404(B) hearing, and it ultimately introduced a certified copy of the transcript of that hearing without any objection from defendant.

On appeal, defendant now argues that the trial court erred in allowing certain details from the article 404(B) hearing into evidence. He lists these particular details as: 1) assertions that defendant is a “terrible,” “awful awful

person” with “a black soul”; 2) a statement that defendant is “obviously an atheist”; 3) an intimation that defendant smuggled steroids from New Orleans to New York; 4) allegations that defendant threatened several of the other crimes witnesses financially; 5) a claim that defendant attacked his ex-wife’s male coworker; 6) a belief that defendant may have put sugar into one of the witnesses’ gas tank; and 7) a proclamation that the authorities “don’t know what [defendant] is capable of.” All of these statements were ancillary facts elicited during the witnesses’ testimonies at the article 404(B) hearing. The main thrust of the evidence introduced at the hearing was that defendant had previous instances of physical abuse against at least three women (Samantha Goodwin, Maryann Smith, and Jennifer Zimmerle) and that he threatened these three women and a fourth – Jodi Morris – physically and financially when they would not obey him.

At the time the state filed the notice of intent to introduce other crimes evidence under article 404(B), defendant opposed the introduction of any of this evidence. However, following the trial court’s ruling allowing this evidence to be introduced, defendant then waived any objections to the introduction of this evidence, including any objections to the relevance of the witnesses’ testimonies.

Considering this waiver and defendant’s stipulation regarding the testimony from the article 404(B) hearing, we conclude that defendant failed to preserve this issue for appellate review by means of a contemporaneous objection. See La. Code Crim. P. art. 841; La. Code Evid. art. 103(A)(1); *State v. Trahan*, 93-1116 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 704 (“[t]he grounds for objection must be sufficiently brought to the court’s attention to allow it the opportunity to make the proper ruling and prevent or cure any error.”). We recognize that the requirement of an objection does

not apply to a trial court's ruling on any written motion. La. Code Crim. P. art. 841(B). However, we find that defendant's stipulation to the trial court's consideration of the article 404(B) testimony as a whole, combined with counsel's renunciation of the right to object to the relevance of any of this testimony, makes this issue unreviewable on appeal. See *State v. Butler*, 30,798 (La. App. 2 Cir. 6/24/98), 714 So.2d 877, 894, writ denied, 98-2217 (La. 1/8/99), 734 So.2d 1222; See also *State v. Gaal*, 2001-0376 (La. App. 5th Cir. 10/17/01), 800 So.2d 938, 952 ("where a defendant initially files a [pretrial] motion objecting to the introduction of certain evidence, if at trial he specifically agrees to its introduction, he has waived his prior objection and loses the right to present the issue on appeal."). If defendant wished to seek to exclude particular pieces of the other crimes testimony, he should not have stipulated to the admissibility of that testimony, nor should he have given up the right to have the state call those individual witnesses at trial. This assignment of error is not reviewable on appeal.

**CONVICTION, HABITUAL OFFENDER ADJUDICATION,
AND SENTENCE AFFIRMED.**